

Right to Privacy in the Digital Age: Children's Right to Privacy While Using Ed Tech Services

**Submissions to UN OHCHR on
Resolution 48/4**

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Children’s Right to Privacy while using Ed Tech Services
Response to OHCHR call for inputs on Resolution 48/4
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1. Background:

The Human Rights Council adopted the Resolution 48/4 on “The right to privacy in the digital age”, where it noted that children are among the groups who can be affected by violations and abuse of the right to privacy in the digital age, and this warrants preventive measures and remedies.

Through this note, the Inclusive Education Team at Vidhi Centre for Legal Policy emphasises the importance of acknowledging and addressing rampant violations of children’s right to privacy due to rapid growth and penetration of Education Technology (“Ed Tech”) service providers. After providing the context for violation of children’s privacy in the face of Ed Tech boom, the note delves into the implications of absence of adequate legal and regulatory framework on children’s privacy, education and development rights. The note concludes by providing a few recommendations to safeguard the rights of children while using Ed Tech services.

2. Context: Violation of Children’s Privacy in the face of Ed Tech Boom

With the onset of the COVID-19 pandemic, children’s right to privacy has been endangered due to the sudden boom in the Ed Tech industry across the world, and especially in India. In fact, the National Education Policy, 2020 has given a nudge to increased deployment of technology in education. It proposes the use of artificial intelligence, machine learning, smart boards, adaptive computer testing etc. to improve student learning in the classroom. The policy also proposes the creation of National Education Technology Forum (NETF) with the objective to facilitate decision making on the induction, deployment and use of technology in education.

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In India, as in several developing countries, the commodification of education by private Ed Tech companies is in violation of the right for all children to education, as it excludes millions of children who do not have adequate access to the required economic resources, devices and internet. Moreover, numerous Ed Tech service providers capitalised on the near 18 months of school closures in India to significantly expand their operations and user base, sometimes through predatory means.² In acknowledgment of this, the Government of India issued an advisory to citizens in December 2021 to exercise caution while using Ed Tech services as it came to light that some service providers lured in parents “*in the garb of offering free services and getting the Electronic Fund Transfer (EFT) mandate signed or activating the Auto-debit feature, especially targeting the vulnerable families.*”³

In a recent report by Human Rights Watch (“HRW”), which covered 49 countries, including India, that had recommended the usage of 164 Ed Tech products for the purpose of children’s online learning during the COVID-19 pandemic, it was highlighted that such learning came at the cost of seriously jeopardising children’s “right to privacy, access to information, and freedom of thought”.

Thus, any discourse on the right to privacy in the digital age needs to necessarily account for the numerous potential violations of children’s rights that are associated with the usage of Ed Tech products.

3. Absence of Adequate Legal Framework Governing the Ed Tech Services

A. Inadequacy of Data Protection and Education laws Impacts Children’s Right to Privacy

Concerns regarding children's right to privacy and potential violations of other rights enumerated in the UNCRC, especially their education rights and right to development, are escalated in the absence of an adequate legal framework governing or regulating the field of ed tech.

² Kritika Sharma, Don’t get lured by ads of ed-tech firms, do your research to avoid fraud, govt tells parents, The Print, 23rd Dec, 2021, <<https://theprint.in/india/education/dont-get-lured-by-ads-of-ed-tech-firms-do-your-research-to-avoid-fraud-govt-tells-parents/786555/>>

³ Ministry of Education (India), Advisory to citizens regarding use of caution against Ed-tech Companies, <<https://pib.gov.in/PressReleasePage.aspx?PRID=1784582>>

To begin with, education legislation in the country does not adequately inform governance of Ed tech service providers. Even though applicable education laws in India broadly prohibit commercialisation of education by private providers - such as the Right to Education (RTE) Act 2009 (the primary Central legislation that governs education delivery in the country) - they are not directly applicable to most ed tech interventions and service providers. This allows ed tech service providers to actively commercialise the space.

Secondly, various external parties who might misuse personal data, from whom the Ed Tech service providers need to protect children's personal information. For example, a data breach suffered by an Indian Ed Tech Company Unacademy in 2020, showcased the gravity of privacy violations when sensitive information of 20 million users - including their names, last login date, location, email addresses, etc. - were put on sale on Dark Web.

These service providers must thus necessarily be governed and regulated by data protection laws. However, data protection laws in India are currently arguably primitive, as seen in the Information Technology Act 2000 and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011. In the meantime, India is still awaiting on the enactment of The Personal Data Protection Bill, 2019 ("PDP Bill"), which seeks to strengthen this regulatory system.

B. Data, Profiling and Automated Processing by Ed Tech Service Providers: Impact on Children's Privacy and Development

Information accessed by the Ed tech services/products may include children's location, identity specific information (name, age, genders etc.), their online activities and behavioural patterns, their likes and dislikes, emotions etc. Such information can be monetised by the Ed Tech service providers, directly or through other players, through a combination of various digital practices such as automated data processing, profiling, behavioural targeting. These practices, which are in violation of children's right to privacy, and have been highlighted by the UN Committee on the Rights of the Child, "*may have adverse consequences on children, which can continue to affect them at later stages of their lives.*"⁴

⁴ Para 68, Committee on the Rights of the Child General Comment No. 25, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/053/43/PDF/G2105343.pdf?OpenElement>>

Article 29 (1) of UN Convention on the Rights of the Child states that one of the objectives that education of children will be directed to is the “*development of the child’s personality, talents and mental and physical abilities to their fullest potential*”. Therefore, States are required to ensure that education and education related services are directed at realising child’s right to develop to their fullest potential. Considering that the activities of Ed Tech service providers are resulting in infringement of the right to privacy of children, which in turn is also negatively affecting children’s development, it could be considered a direct violation of education rights of the children.

C. Need to Prohibit Profiling, Behavioural Monitoring and Targeted Advertisements Based on Data Collected From Children’s Educational Activities

Any information pertaining to children which is collected by the Ed Tech service providers in their pursuit of facilitating learning through digital modes, should be prohibited from being subjected to any form of automated processing that may lead to profiling, behavioural targeting for educational or non-educational purposes or which may subject the children to targeted advertisements. The ed tech service providers must be regulated such that they are only allowed to adopt the “*least privacy-intrusive means available to fulfil the desired purpose*”⁵ of providing education through digital means, which essentially means that only such information which is absolutely essential to impart education may be collected by such service providers with prior informed consent of the children, or of their parents/guardians in case of very young children.

It is important to ensure that the concern of data privacy and child safety are also actively addressed by recently formed collectives [consortium](#) of leading Ed-tech private players in India, especially as it is set to function without any government oversight of any form.

The PDP Bill is the impending legislation consisting of significant regulatory and punitive provisions which can cover the Ed Tech service providers among the others. It recognises the negative impact that automated processing of information can have on the children, and bars

⁵ Para 75, Committee on the Rights of the Child General Comment No. 25, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/053/43/PDF/G2105343.pdf?OpenElement>>

data fiduciaries⁶ “*who operate commercial websites/online services directed at children or who process large amounts of personal data of children*” from profiling, tracking, behaviourally monitoring or targeted advertising that is directed at children. The Bill also bars any processing of personal data which can cause significant harm to children.

Ed Tech services also heavily rely on Artificial Intelligence and automated processing to draw inferences with respect to particular student’s abilities, inclinations and shortcomings in order to curate their content for the respective students, and to monitor and evaluate student’s progress during the course. Such automated processing, which draws inferences about child’s abilities based on the limited interactions with the specific service provider, is highly problematic as it not only does not account for numerous other indicators which showcase a child’s abilities, it also potentially influences the career choices that such children make based on the inferences drawn through such processing.

In order to safeguard the privacy, educational and development rights of children, it becomes necessary to prohibit the Ed Tech service providers from relying on automated processing methods while handling the data concerning the children or generated by the children while interacting with their apps/websites, especially in cases where such automated processing is used to draw inferences about children’s abilities and/or is likely to impact their development. Further, while express and informed consent of the children and/or their parents/guardians can be mandated for manually processing children’s data (to the limited extent), it must necessarily be accompanied by conditions which allow for greater control over the results/outcomes to the person whom the data belongs to, thereby eliminating any scope for unwarranted inferences. Moreover, adequate safeguards must be put in place to ensure that the consent acquired by the Ed Tech service providers is an informed consent, remains optional for the users without impacting their access to education services, and that the consent is sought whenever there is a change in the usage of the data collected and generated.

It was reported that the data extracted from children’s educational settings, which was used to relay targeted advertisements to such children, “*not only distorted children’s online experiences, but also risked influencing their opinions and beliefs at a time in their lives*

⁶ S. 3(13), The Personal Data Protection Bill 2019, <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf>

when they are at high risk of manipulative interference". In addition, it is clear that the inferences drawn are used to not only monitor and evaluate a child's progress in a particular course, but is also used by the Ed Tech Service Providers to accumulate monetary benefits through external advertising sources/providers which specialise in behavioural advertising and rely on the inferences so generated.

4. Recommendations:

A. Strengthen Legal Framework Regulating Ed Tech Services

Both the Data Protection laws as well as the Education laws in the States need to be strengthened to ensure that the Ed Tech Service Providers do not indulge in violations of children's right to privacy. They must necessarily prohibit or considerably limit the usage of automated processing of the data collected from, and generated by the children while interacting with the specific Ed Tech services.

B. Constitute a Dedicated Regulatory Body to Oversee the usage of Tech Services in Education

Suggestively, concerns around data privacy and its ensuing frameworks can be formulated and overseen by bodies such as NETF (as proposed by the National Education Policy 2020) and should apply to all Ed Tech services - public and private.

C. Need to Address Informational asymmetry to Facilitate Children and Parents to Make Informed Decisions

Spreading awareness regarding the usage of Ed Tech services, and the associated risks to children's right to privacy must be prioritised both by the respective governments as well as the service providers themselves. Any legal and regulatory framework governing the Ed Tech industry will fall short of safeguarding the best interests of children if the children and their parents/guardians are not made aware of the specific risks and challenges that are associated with the usage of Ed Tech services.